STATE OF NEW YORK
SUPREME COURT : COUNTY OF MONROE

GAY ALLIANCE OF GENESEE VALLEY, INC.,

Plaintiff,

- against - Index No. 8872/91

CITY ASSESSOR, CITY OF ROCHESTER, NEW YORK,

Defendant,

APPEARANCES:

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MEMORANDUM DECISION

ANDREW V. SIRACUSE, J.

The Gay Alliance of Genesee Valley, Inc. ("GAGV") is a non-profit membership organization devoted both to the needs of the homosexual community in the Rochester area and to furthering the understanding and acceptance of that community by the public as a whole. In March, 1990, the GAGV purchased a building to house its offices and activities. It applied to the City of Rochester for a property tax exemption under Real Property Tax Law § 420-a.

The City's rejection of that application is without foundation in law and can only be explained by the nature of the Alliance's membership and focus. It thus constitutes a violation of the GAGV's federal constitutional rights to equal protection and renders the City liable for attorneys' fees under 42 USC § 1988. In addition, the City's last-minute discovery demands are so clearly frivolous that this Court orders a hearing on possible sanctions under 22 NYCRR § 130-1.1.

FACTS

The Gay Alliance of Genesee Valley has among its purpose

> the eradication of homophobia, the delivery of unbiased health care, employment protection, social integration, full legal rights and protection, [and] personal and financial security for all (GAGV By-Laws and Constitution, preamble).

In furtherance of these aims it seeks to research and advance gay liberation and equal rights for persons of homosexual orientation, improve such people's quality of life and create a physical focus for the gay and lesbian community. It also furnishes advice and assistance for those discriminated against on the basis of sexual orientation, and educates the larger public about the civil rights of gay and lesbian citizens (GAGV Certificate of Incorporation). Its activities include regular social and educational programs, a free newspaper, a speakers' bureau and a telephone hotline. Among its responses to the AIDS crisis are a series of safe sex workshops and support for survivors of those who have died of AIDS.

The Alliance was granted exemption from federal taxation on November 19, 1981, but the property tax question did not arise until it purchased a headquarters building on Atlantic Avenue in the City of Rochester, in March, 1990. On January 28, 1991, it applied to the City for a tax exemption under Real Property Tax Law § 420-a. Given a choice on the application of checking "Religious", "Charitable", "Hospital", "Educational", or "Moral or mental improvement of men, women or children", it chose "Educational" as its purpose.

On March 8, 1991, the City Assessor denied the application. The rejection letter enclosed a memorandum from Municipal Attorney Susan Hauser, stating that educational exemptions were limited to applicants which "conduct organized instructional programs, with a curriculum, classes, and a faculty."

The Alliance brought an administrative appeal on March 22, 1991. A letter memorandum from its attorney asserted that the Alliance was tax-exempt because its activities fell within the broad interpretation of Real Property Tax Law § 420-a set out by the Court of Appeals in Matter of Symphony Space v Tishelman (60 NY2d 33). The Board of Assessment Review conducted a hearing on March 26, 1991, at which time the then president of the GAGV gave testimony.

In preparation for the decision the Municipal Attorney wrote another memorandum. Instead of maintaining, as it had done previously, that classes and curriculum were sine qua non for an educational exemption, the City now argued that there was a

distinction between education and advocacy. In the Symphony Space case an informal, non-degree-granting institution was held to have an educational purpose. Once "learning is instigated by the teacher", however, the institution was no longer educational but advocacy-oriented; although the Alliance's activities "are informative and probably beneficial",

> because those activities are driven by a specific point of view, a mission, a goal, a desire to cause social change, rather than a neutral and disinterested offering of knowledge for its own sake, the Gay Alliance does not * * * qualify for tax exemption.

On April 30, 1991, the City sent the GAGV a computer-generated letter denying a purported request to raise the property's assessed value from $50,000 to $72,500. After a telephone inquiry the City explained, in a letter dated August 22, 1991, that this notice, while containing "some inaccuracies", "did accurately state the Board's decision on the complaint, i.e., that the Board was not granting any exemption."

On August 24, 1991, the GAGV brought the present action. Originally framed as an Article 78, it was converted on request of the City to a declaratory judgment action. The City has not claimed that the letter of April 30, 1991, was a determination of the application and has not raised any issue as to the timeliness of this action.

PROCEDURAL HISTORY

The Alliance's complaint asserted that it met the Symphony Space test for an exemption. As a second cause of action, it

pointed to numerous tax-exempt groups with an advocacy focus, including the YWCA and several neighborhood groups, and argued that refusal to grant the Alliance's tax exemption was an unconstitutional denial of equal protection.

The City's answer raised two defenses: that the GAGV's claims to status as a charitable organization or one devoted to moral or mental improvement had not been presented, and that the assessor's decision was based on state law and created no equal protection issue.

On October 15, 1992, the GAGV moved to amend its complaint to add a cause of action under the Federal Civil Rights Act, 42 USC § 1983 and a consequent claim for attorneys' fees under 42 USC § 1988. At the same time the GAGV moved for summary judgment.

The City cross-moved for summary judgment dismissing the complaint on November 12, 1992. The City argued that the Alliance fell within none of the three separate relevant grounds set out in the Real Property Tax Law. In addition, the City claimed that its action could not be discriminatory because it was mandated by the Real Property Tax Law and because the City has an official policy against discrimination on the basis of sexual orientation.

On December 1, 1992, this Court denied both motions without prejudice to renew and returned the matter to the City for an explicit ruling on the Alliance's administrative complaint. That

ruling, which was dated December 31, 1992, rejected the application without explanation.

The Alliance then renewed its motion to amend the complaint. At oral argument, on February 18, 1993, the City conceded that no further factual submissions were required, at least insofar as the property tax issue was concerned. By a decision dated February 19, 1993, subsequently converted into an order and entered February 26, 1993, this Court granted the Alliance's motion, rejecting the City's argument that it could only be liable under 42 USC § 1983 for acts pursuant to official policy or custom. The City was duly served with the amended complaint.

The City raised four affirmative defenses in its answer. Insofar as the City Assessor was being sued in his individual capacity, it asserted, he was protected by qualified immunity and was acting in good faith on a legal opinion by the municipal attorney. The City reiterated the "official policy or custom" argument rejected in this Court's decision of February 19, 1993, and raised once again the defense that no equal protection issue was created by an interpretation of the Real Property Tax Law.

Along with its answer the City served the Alliance with demands for more financial information -- tax returns and financial statements -- and a demand to produce the current president of the GAGV for a deposition. The City did not allege a basis for these demands, the first discovery requests in the nineteen-month history of the case.

The present decision arises from the Alliance's two motions of March 23, 1993, one for a protective order under CPLR 3103[1] and the other for summary judgment. The two motions will be considered in that order. In addition, the City, in papers filed literally at the last minute under CPLR 2214, has renewed its cross-motion for summary judgment and defended its discovery demands on the grounds that it needs more detailed information about the actual uses to which the Alliance puts its property and income.

PROPRIETY OF THE CITY'S DISCOVERY DEMANDS

While the CPLR encourages broad and prompt disclosure, a protective order may be warranted if necessary

> to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts (CPLR 3103 [a]).

If the material requested is unnecessary (Bandike Assoc. v B.B.M. Realty Corp., 55 AD2d 999), irrelevant (Kaufman v Kaufman, 125 AD2d 293; Herscovit v County of Nassau, 89 AD2d 598) or both (Seltel, Inc. v Channel Communications, 122 AD2d 628), a protective order may issue. The case for a protective order is especially strong when the demand for immaterial or unnecessary documents amounts to undue harassment (Pearson v National Budgeting Systems, 31 AD2d 792).

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[1] Although the GAGV contests the propriety of both discovery demands, it has supplied the City with the requested financial records.

The City's discovery demands come at an unexpected time; this action has been pending for more than a year and a half, the City itself cross-moved for summary judgment on the unamended complaint, and the City's attorney has several times assured the Court that no further factual material was necessary to decide the issues raised therein -- a position implicit in its earlier cross motion. Indeed, the City did not contest the factual affirmation submitted by the GAGV with its summary judgment motion, thus conceding these facts, and explicitly conceded the main points of the GAGV's case in its memorandum accompanying its cross-motion:

> The City does not dispute that the GAGV is the owner of the subject parcel * * * that the parcel is used in furtherance of the GAGV's corporate purposes; that the GAGV is a bona-fide not-for-profit organization which performs a worthwhile community service; that there is no hidden commercial motive behind the GAGV's activities and no hidden profiteering by any involved individuals (Memorandum, at 2).

Since the GAGV is required to show that (1) it is organized exclusively for the purposes set out in Real Property Tax Law § 420-a, (2) its property is used primarily in furtherance of these purposes, (3) no pecuniary profit (beyond reasonable compensation) enures to its officers or members and (4) the property is not used for commercial operations (Matter of Nassau County Council Boy Scouts of America v Board of Assessors of the Town of Rockland, 84 AD2d 862), it is clear that the City and the GAGV differ only on the legal effect of agreed-upon facts -- that is, whether the purposes of the GAGV fall within section 420-a.

Although the City's memorandum declined to address the GAGV's claim under 42 USC § 1983, it is worth noting that the original complaint pleaded a cause of action for violation of the Alliance's rights to equal protection, and the City's motion was necessarily addressed to this claim as well.

The City, then, clearly stated and acted upon its belief that all necessary facts were before the Court as to the original complaint. What is more, the City had already been supplied with all financial information requested by the Assessor and the Board of Assessment Review, and had taken sworn testimony from the president of the Alliance at the March 26, 1991, hearing. Only special circumstances would justify the tardy demand for disclosure with respect to the issues raised in the original complaint, and the City alleges none.

In the posture of this case, moreover, the City's demands are too late and rest only on conjecture and surmise. The City claims that it needs to determine the true nature of certain of the Alliance's activities: who calls the hotline and why, what uses the building's rooms are put to, the social component of activities ostensibly educational, and similar questions. The City raises these concerns, though, in responding papers to a summary judgment motion in which the Alliance explained the nature of these activities -- facts which the City apparently hopes to refute with material derived from the deposition. It is too late to do so. Mere allegations that the Alliance's descriptions of its activities may be inaccurate are not the

evidentiary facts necessary to defeat summary judgment (see, Amatulli v Delhi Constr. Corp., 77 NY2d 525, 533). In addition, summary judgment may not be withheld because of an alleged need for discovery when, as here, the opponent has failed to seek discovery when it had the opportunity to do so (see, e.g., Guarino v Mohawk Containers Co., 59 NY2d 753, 754 [seventeen months' delay]) or on the basis of a mere hope or surmise that facts supporting the opponents' case might turn up in discovery (see, First City Natl. Bank & Trust Co. v Heaton, 165 AD2d 710, 712; Kennerly v Campbell Chain Co., 133 AD2d 669, 670 [to delay summary judgment would sanction fishing expedition]). In fact, while claiming in its latest papers that it needs further information to defeat the Alliance's claim, the City stated at oral argument that, as far as the tax exemption issue is concerned, it had nothing to add to the legal arguments made in its earlier papers. It is difficult to see how these two positions can be reconciled.

The additional claim under 42 USC §§ 1983 and 1988 furnishes no other grounds for the demand. First of all, this claim proceeds from no facts not alleged in the original complaint that the GAGV was denied equal protection. Secondly, it is not clear how information about the Alliance's finances or obtainable from its president could shed light on the discriminatory character of the Assessor's actions; the Assessor based his decision on the material requested and submitted. Furthermore, no discovery from the GAGV could support the new defenses raised by the City:

qualified immunity, good faith, and failure to establish municipal policy or custom. These are the only additional issues raised in the current exchange of pleadings, and as to these issues the City's demands seek material that is clearly both immaterial and unnecessary.

The Alliance's motion for a protective order is granted, with costs. However, this case presents circumstances which suggest that a stronger remedy than a protective order may be appropriate. The absence of a sound basis in law for these demands is obvious. Even more troubling, though, is their timing. The City was fully aware that the GAGV was preparing to renew its motion for summary judgment on the basis of the amended complaint, and it is hard to escape the suspicion that the demands were made in order to harass and prejudice the Alliance and to delay the resolution of this case. For these reasons a hearing will be ordered within the next 30 days, pursuant to 22 NYCRR § 130-1.1, to determine if financial sanctions should be imposed (see, 22 NYCRR § 130-1.1 [c] [1], [2]). The Court will notify the Corporation Counsel's office of the time, place and format of the hearing (see, 22 NYCRR § 130-1.1 [d]).

GAGV'S ENTITLEMENT TO AN EXEMPTION UNDER RPTL 420-a

As noted above, the City concedes that the GAGV is a bona fide non-profit organization that does work in the public interest. The only point on which the litigants part company is the interpretation of Real Property Tax Law § 420-a (1) (a).

That section sets out a legislative policy that certain property is entitled, as a matter of law, to exemption from taxation. Unlike property described in the permissive sections of the Real Property Tax Law, property that meets the test set out in section 420-a must be exempt. The City's references at oral argument to the tax burden placed on less affluent homeowners and to the Alliance's healthy financial status are not relevant to the issues before the court.

The section reads, in pertinent part:

> Real property owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational or moral or mental improvement of men, women or children purposes, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes * * * shall be exempt from taxation * * *.

For the purposes of this action the relevant categories are charitable, educational and moral or mental improvement.

The City interprets this statute as setting out a series of discrete categories. An educational organization must provide organized instruction or disseminate knowledge upon the request of the learner. A charitable organization "provides a necessary commodity or service to needy persons" (Memorandum, 8). The final category, organizations promoting the moral or mental improvement of men, women or children, is restricted to groups like the YMCA, for whose benefit the language was added by L 1893, ch 498.

The City maintains that the GAGV conducts no classes and expresses a viewpoint, thus failing to qualify as "educational";

it distributes no funds to the needy, unlike the neighborhood advocacy groups cited by the GAGV in its papers, and is thus not "charitable"; and it is not similar in any way to the YMCA, so cannot qualify as contributing to the "moral and mental improvement" of the public.

This argument is fallacious. It is inconsistent with the statute's language, which exempts groups organized or conducted "for two or more * * * purposes", and has repeatedly been rejected by the Court of Appeals in cases which the City itself cites and consistently mischaracterizes. The City interprets Matter of Symphony Space v Tishelman (60 NY2d 33, supra) as extending the concept of "education" to include the peculiar needs of performing arts instruction. There is no language in the case amenable to such an interpretation. The Court of Appeals, in fact, explicitly addressed the very argument made by the City:

> In contrast with the approach taken by this court, Trial Term, in the present case, has taken a narrow and fragmentary view of the exemption. In rejecting petitioner's argument that it was organized for educational purposes, the court focused on the fact that Symphony Space was not approved by the Commissioner of Education, was not chartered by the Board of Regents, and does not have faculty or student enrollment. The court similarly rejected the exemption under the "moral or mental improvement" category, reasoning that the exemption was meant to cover only YMCA types of organizations and was not intended to cover the performing arts. However, this court has not made such requirements necessary before an institution qualifies for a tax exemption under those categories. In fact, rather than dissecting each exempt purpose, this court has indicated that the statute may encompass property used primarily for various and varied charitable and educational purposes and the moral or

> mental improvement of the citizenry (supra, 60 NY2d at 37, citations omitted, emphasis added).

Even if Symphony Space might be shoehorned into the educational category -- an attempt not sanctioned by the Court of Appeals's words -- the City's interpretation of the statute would be inconsistent with the earlier Court of Appeals decision in Mohonk Trust v Board of Assessors of Town of Gardiner (47 NY2d 476), cited with approval in Symphony Space. The property at issue in Mohonk Trust was a wilderness reservation owned by a private trust. The Court had no difficulty finding that the Trust land was

> used primarily for an assortment of "charitable * * * educational, [and] moral improvement of men, women or children" purposes * * * (supra, 47 NY2d at 484, emphasis added).

Yet no wilderness area could qualify under the City's "fragmentary" set of tests: no classes are held therein, no funds or goods are distributed by it to the needy, and there is no similarity between it and the YMCA.

This does not end the inquiry, however, for the burden is on the taxpayer to demonstrate entitlement to the exemption (see, Matter of New York Botanical Garden v Assessors of Town of Washington, 55 NY2d 328; Matter of Nassau County Council Boy Scouts of America v Board of Assessors of the Town of Rockland, 84 AD2d 862, supra), and the statutory requirements should be construed strictly against the taxpayer, although "an interpretation so literal and narrow that it defeats the exemption's settled purpose is to be avoided" (Matter of Symphony

Space v Tishelman, 60 NY2d 33, 36, supra). Regardless of the weakness of the City's argument, the GAGV has the burden of proof.

Similar organizations in New York City and Albany have received exemptions from property taxation, and while these decisions admittedly have no binding authority they suggest that the Alliance falls within the "educational, charitable, and moral or mental improvement" categories of section 420-a as understood in the light of the Symphony Space and Mohonk Trust cases. To the extent the Alliance is an advocacy group, as charged by the City, it advocates not homosexuality but the legitimate rights and needs of the gay and lesbian community, rights recognized by the City in its anti-discrimination ordinance. This is essentially an educational function. These activities also serve to build tolerance and understanding between that community and the larger public, contributing to the moral and mental improvement of the entire community. The Alliance's AIDS-related work is also educational, on a topic of pressing importance to all. The telephone hotline and the outreach and support programs for gay and lesbian youth and minorities meet similar needs and, along with the AIDS-related programs, furnish important social services that might otherwise have to be met, if at all, through tax-funded social welfare agencies.

That certain of the GAGV's activities are clearly social or recreational does not defeat its claim, for it is well settled that "exclusive" means, in the context of the statute,

"principal" or "primary" (Mohonk Trust v Board of Assessors of Town of Gardiner, 47 NY2d 476, 483, supra; Matter of Nassau County Council Boy Scouts of America v Board of Assessors of the Town of Rockland, 84 AD2d 862, supra). The principal or primary purpose of the Alliance is to build understanding, eliminate discrimination, and provide counselling and support. That similar activities fall within the exempt categories has been recognized by the City in granting exemptions to neighborhood advocacy organizations. Group 14621, Inc., for example, is exempt; it seeks, inter alia

> (a) To further the interests of the inhabitants [of the 14621 neighborhood] * * *
>
> (c) To promote fellowship and social intercourse among the members * * * [and]
>
> (e) To promote and encourage laws for the protection of the inhabitants of the area.

The 19th Ward Community Association is also exempt; its stated purposes include:

> 1) To create a conscious multi-racial community where individual and cultural differences are not only tolerated but celebrated, and where people share a sense of community; [and]
>
> 2) To insure that the community, through the Association, determines and receives the kinds of high quality services it needs from public and private institutions.

The City claims that these organizations are exempt because they receive government funds to administer programs benefitting low-income residents, and are thus charitable. This argument is not a strong one, as the announced purposes of both groups show that administering programs addressed to the needy is neither a

primary nor a principal purpose of either one.[2] In addition, the GAGV itself has received government grants in support of some of its programs, many of which contain a strong secondary focus on the needs of the less than affluent.

The purposes of the GAGV are in general educational, charitable (in the sense of supplying social services free of charge) and relevant to the moral and mental improvement of the population, through the fostering of understanding between those of heterosexual and homosexual orientation. Accordingly, the GAGV has met its burden of proof, and is entitled to a declaration that it is entitled to a mandatory tax exemption under Real Property Tax Law § 420-a, to the appropriate ancillary relief, and to the costs and disbursements in this action.

THE CIVIL RIGHTS CLAIM UNDER 42 USC § 1983

The City raises four defenses against the imposition of liability under 42 USC § 1983, which provides that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured * * *.

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[2] It should be noted that Group 14621's attorney, in papers drafted for a suit to force a tax exemption, characterized the organization's purpose as "charitable". This is hardly dispositive, and is not supported by a reading of the Group's papers or capable of justifying the City's decision to grant the exemption before the question was litigated.

The first two of the City's defenses are patently frivolous, as they presuppose that the assessor is being sued in his individual capacity. The caption itself speaks to these; the Assessor is being sued as the chief decision maker of the City with respect to tax exemptions, and thus in his official capacity.[3] The City next claims that the complaint fails to plead that the Assessor's acts were made pursuant to official policy or custom. No such requirement exists, and exactly this point was resolved against the City in this court's decision of February 19, 1993. The issue is res judicata.[4]

The City's final defense is that each exemption stands on its own, and that the Assessor was constrained by the categories of State law. This defense requires further discussion, for not

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[3] At oral argument on the motion to amend the complaint the City suggested that the Board of Assessment Review was the proper party to be sued. The City has not raised this issue in connection with the present motion, and, as noted in this court's earlier decision, the Board could have been added as a party on the court's own motion. The addition would be merely technical; no conceivable difference in the City's defense would result from it.

[4] In that decision this court stated that the defense "is simply wrong, and rests on a discussion of case law so selective as to be misleading. Monell v New York City Dept. of Social Services (436 US 658), the sole case cited, explicitly declined to set out the boundaries of municipal liability, and it is clear from subsequent cases that they may be liable for acts pursuant to policy or custom or for single acts 'by the highest officials responsible for setting policy in that area of the government's business' (City of St. Louis v Praprotnik, 485 US 112, 123). As the City Assessor is charged with determining applicants' entitlement to property tax exemptions, his rejection of GAGV's application might well subject the City to liability if found to be discriminatory." The City's answer, once again, cites Monell as if it exhausted the range of municipal liability and does not discuss the holding in Praprotnik.

all errors of law create constitutional issues; no discriminatory purpose could be found if, for example, the City's denial of the GAGV's application was consistent with other equally improper denials, all resting upon an indefensibly fragmented interpretation of the Real Property Tax Law's categories. Such facts would support only the inference that the City routinely misconstrues the statute.

It appears from the record, however, that only the Alliance suffered from this misconstruction. As was discussed above, the neighborhood advocacy groups granted tax exemptions cannot be considered charitable merely because they receive some money to service the needs of low-income residents. To hold as much would be to eliminate the requirement that the group be organized or conducted primarily or principally for tax-exempt purposes. The stated purposes of neither organization fit within the narrow categories advanced by the City.

The record also shows that the City has granted tax-exempt status to a public broadcasting station (WXXI) and to several organizations which are at least as much counselling and advocacy groups as medical ones (Planned Parenthood, the Drug and Alcohol Council, and Cancer Action, the Association for the Learning Disabled, the Genesee Valley Heart Association). The bases for these exemptions are not shown, but the organizations do not fall within the permissive sections of the Real Property Tax Law, and the exemptions could not be justified under the interpretation of

the statute that the City, in essence, claims has been consistently applied to all applicants.

Moreover, the City's own position on the GAGV's ineligibility has shifted; at first the rejection was said to be based on the absence of formal curriculum and students; then the Alliance was told it was ineligible because of its advocacy focus; finally, it was told that other advocacy groups were in fact charitable organizations. These sound very much like after-the-fact rationalizations.

The inference of discrimination would not be raised were there any showing that the erroneous interpretation of Real Property Tax Law § 420-a was in fact the City's standard for deciding applications. However, it seems clear that all other applications were correctly weighed according to the broader view taken by the Court of Appeals. There is only one reasonable explanation for the Assessor's denial of the GAGV's application: that the GAGV was denied a tax exemption because the Assessor (and the City) saw support, education and advocacy for the gay and lesbian community in a different light than it did support, education and advocacy for, e.g., residents of the 14621 or 19th Ward neighborhoods. The other explanations offered by the City are unsatisfactory and unsupported by the record. Thus, the GAGV's application received discriminatory treatment on the basis of the character of its membership and the content of its speech, clear denials of its Constitutional rights. As the Assessor was the person whose acts as to tax exemptions may fairly be said to

express and delineate municipal policy (see, generally, City of St. Louis v Praprotnik, 485 US 112, 123; Rookard v Health and Hospitals Corp., 710 F2d 41, 45 n 3 [2d Cir]), his discriminatory act renders the City liable under 42 USC § 1983.

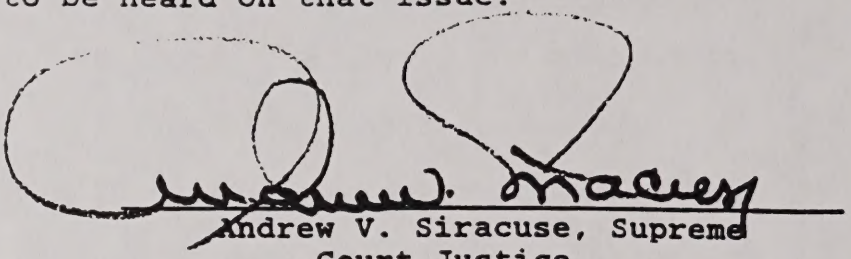
Once a violation of 42 USC § 1983 is found, there is a presumption in favor of an award of attorneys' fees to the successful party (Annunziato v The Gan, Inc., 744 F2d 244, 253 [2d Cir]). Such fees are not punishment but compensation to encourage the bringing of civil rights claims (Coalition for Basic Human Needs v King, 691 F2d 597, 602 [1st Cir]). When an officer is sued in his or her official capacity, no defense can be raised as to the officer's good faith (Hutto v Finney, 437 US 678, 693 - 700; Coalition for Basic Human Needs v King, supra; see, generally, Cohen v West Haven Bd. of Police Com'rs, 638 F2d 496, 504 [2d Cir]); only in cases where the defendant is innocent of real responsibility and made prompt and reasonable efforts to avoid or settle the lawsuit should attorneys' fees be denied (Annunziato v The Gan, Inc, supra, 744 F2d at 253 - 254).

None of these special circumstances are present here; indeed, the City's actions have partaken of the obstructionist. The court will entertain a motion under 42 USC § 1988 to

determine the amount to be awarded. Proof will be required of the reasonableness of the fees demanded, and the City will be given an opportunity to be heard on that issue.

Submit order.

DATED: April 6, 1993



Andrew V. Siracuse, Supreme Court Justice